



DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 300

[REG-100718-21]

RIN 1545-BQ06

User Fees Relating to the Enrolled Agent Special Enrollment Examination and the Enrolled Retirement Plan Agent Special Enrollment Examination

**AGENCY:** Internal Revenue Service (IRS), Treasury.

**ACTION:** Notice of proposed rulemaking and notice of public hearing.

**SUMMARY:** This document contains proposed amendments to the regulations relating to the user fees for the special enrollment examinations for enrolled agents and enrolled retirement plan agents. This document also contains a notice of public hearing on the proposed regulations. The proposed regulations increase the amount of the user fee for each part of the special enrollment examination for enrolled agents (EA SEE). The proposed regulations also remove the user fee for the special enrollment examination for enrolled retirement plan agents (ERPA SEE) because the IRS no longer offers the ERPA SEE or new enrollment as an enrolled retirement plan agent. The proposed regulations affect individuals taking the EA SEE. The Independent Offices Appropriation Act of 1952 authorizes charging user fees.

**DATES:** Electronic or written comments must be received by **[INSERT DATE 45 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**. The public hearing is being held by teleconference on November 23, 2021 at 10 a.m. EST. Requests to speak and outlines of topics to be discussed at the public hearing must be received by **[INSERT DATE 45 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**. If no outlines are received by **[INSERT DATE 45 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**, the public hearing will be cancelled.

Requests to attend the public hearing must be received by 5:00 p.m. EST on November 19, 2021. The telephonic hearing will be made accessible to people with disabilities. Requests for special assistance during the telephonic hearing must be received by November 18, 2021.

**ADDRESSES:** Commenters are strongly encouraged to submit public comments electronically. Submit electronic submissions via the Federal eRulemaking Portal at [www.regulations.gov](http://www.regulations.gov) (indicate IRS and REG-100718-21) by following the online instructions for submitting comments. Once submitted to the Federal eRulemaking Portal, comments cannot be edited or withdrawn. The IRS expects to have limited personnel available to process public comments that are submitted on paper through the mail. Any comments submitted on paper will be considered to the extent practicable. The IRS will publish any comments submitted electronically, and to the extent practicable comments submitted on paper, to the public docket. Send paper submissions to: CC:PA:LPD:PR (REG-100718-21), Room 5203, Internal Revenue Service, P.O. Box 7604, Ben Franklin Station, Washington, D.C. 20044.

For those requesting to speak during the hearing, send an outline of topic submissions electronically via the Federal eRulemaking Portal at [www.regulations.gov](http://www.regulations.gov) (indicate IRS and REG-100718-21).

Individuals who want to testify (by telephone) at the public hearing must send an email to [publichearings@irs.gov](mailto:publichearings@irs.gov) to receive the telephone number and access code for the hearing. The subject line of the email must contain the regulation number REG-100718-21 and the word TESTIFY. For example, the subject line may say: Request to TESTIFY at Hearing for REG-100718-21. The email should include a copy of the speaker's public comments and outline of topics. Individuals who want to attend (by telephone) the public hearing must also send an email to [publichearings@irs.gov](mailto:publichearings@irs.gov) to receive the telephone number and access code for the hearing. The subject line of the

email must contain the regulation number REG-100718-21 and the word ATTEND. For example, the subject line may say: Request to ATTEND Hearing for REG-100718-21. To request special assistance during the telephonic hearing, contact the Publications and Regulations Branch of the Office of Associate Chief Counsel (Procedure and Administration) by sending an email to [publichearings@irs.gov](mailto:publichearings@irs.gov) (preferred) or by telephone at (202) 317-5177 (not a toll-free number).

**FOR FURTHER INFORMATION CONTACT:** Concerning the proposed regulations, Karen Wozniak at (202) 317-5129; concerning cost methodology, Michael A. Weber at (202) 803-9738; concerning submission of comments, the hearing, and the access code to attend the hearing by telephone, Regina Johnson at (202) 317-5177 (not toll-free numbers) or [publichearings@irs.gov](mailto:publichearings@irs.gov).

**SUPPLEMENTARY INFORMATION:**

**Background and Explanation of Provisions**

This document contains proposed amendments to 26 CFR part 300 regarding user fees.

*A. Enrolled Agents, Enrolled Retirement Plan Agents, and the Special Enrollment Examinations*

Section 330 of Title 31 of the United States Code authorizes the Secretary of the Treasury to regulate the practice of representatives before the Department of the Treasury (Treasury Department) and require that an individual seeking to practice demonstrate the necessary qualifications, competency, and good character, and reputation. The rules governing practice before the IRS are published in 31 CFR, Subtitle A, part 10, and reprinted as Treasury Department Circular No. 230 (Circular 230).

Section 10.4(a) of Circular 230 authorizes the IRS to grant status as enrolled agents to individuals who demonstrate special competence in tax matters by passing a

written examination, the EA SEE, and who have not engaged in any conduct that would justify suspension or disbarment under Circular 230.

The EA SEE is comprised of three parts and an applicant generally must pass all three parts within two years to be granted enrolled agent status through written examination. The EA SEE testing period generally begins on May 1 each year and ends the last day of the following February. The EA SEE is not offered during March and April when it is updated to reflect recent changes in the relevant law. More information on the EA SEE, including content, scoring, and how to register, can be found on the IRS website at [www.irs.gov/tax-professionals/enrolled-agents](http://www.irs.gov/tax-professionals/enrolled-agents). Since 2006, the IRS has engaged the services of a third-party contractor to develop and administer the EA SEE. The IRS Return Preparer Office (RPO) oversees the development and administration of the EA SEE. As of August 30, 2021, there were 62,686 enrolled agents.

Section 10.4(b) of Circular 230 authorizes the IRS to grant status as enrolled retirement plan agents to individuals who demonstrate special competence in qualified retirement plan matters by passing a written examination, the ERPA SEE, and who have not engaged in any conduct that would justify suspension or disbarment under Circular 230. The IRS stopped offering the ERPA SEE as of February 12, 2016, and no longer accepts applications for new enrollment as an enrolled retirement plan agent. Accordingly, the proposed regulations remove the user fee for the ERPA SEE. Individuals currently enrolled as retirement plan agents can maintain their status as enrolled retirement plan agents. As of August 30, 2021, there were 743 enrolled retirement plan agents.

#### *B. User Fee Authority*

The Independent Offices Appropriation Act of 1952 (IOAA) (31 U.S.C. 9701) authorizes each agency to promulgate regulations establishing the charge for services

provided by the agency. The IOAA states that the services provided by an agency should be self-sustaining to the extent possible. 31 U.S.C. 9701(a). The IOAA provides that user fees are subject to policies prescribed by the President, which are currently set forth in the Office of Management and Budget (OMB) Circular A-25 (OMB Circular A-25), 58 FR 38142 (July 15, 1993).

Section 6a(1) of OMB Circular A-25 states that when a service offered by an agency provides special benefits to identifiable recipients beyond those accruing to the general public, the agency is to charge a user fee to recover the full cost of providing the service. Section 8e of OMB Circular A-25 requires agencies to review user fees biennially and update the fees as necessary to reflect changes in the cost of providing the underlying services. During the biennial review, an agency must calculate the full cost of providing each service, taking into account all direct and indirect costs to any part of the U.S. government. Under section 6d(1) of OMB Circular A-25, the full cost of providing a service includes, but is not limited to, an appropriate share of salaries, medical insurance and retirement benefits, management costs, and physical overhead and other indirect costs, including rents, utilities, and travel, associated with providing the service.

An agency should set the user fee at an amount that recovers the full cost of providing the service unless the agency requests, and the OMB grants, an exception to the full-cost requirement. Under section 6c(2) of OMB Circular A-25, the OMB may grant exceptions when the cost of collecting the fees would represent an unduly large part of the fee for the activity or when any other condition exists that, in the opinion of the agency head, justifies an exception. When the OMB grants an exception, the agency does not collect the full cost of providing the service and must fund the remaining cost of providing the service from other available funding sources. Consequently, the agency subsidizes the cost of the service to the recipients of

reduced-fee services even though the service confers a special benefit on those recipients who would otherwise be required to pay the full cost of receiving the benefit as provided for by the IOAA and OMB Circular A-25.

### *C. The EA SEE User Fee*

Section 10.4(a) of Circular 230 provides that the IRS will grant enrolled agent status to an applicant who, among other things, demonstrates special competence in tax matters by written examination. The EA SEE is the written examination by which applicants can demonstrate special competence in tax matters, and an applicant must pass all three parts of the EA SEE to be granted enrolled agent status through written examination. The IRS confers a benefit on individuals who take the EA SEE beyond those that accrue to the general public by providing them with an opportunity to demonstrate special competence in tax matters by passing a written examination and thereby satisfy one of the requirements for becoming an enrolled agent under section 10.4(a) of Circular 230. Because the EA SEE is a service that provides a special benefit to test takers, the IRS charges a user fee to take the examination.

Final regulations (TD 9820) published in the *Federal Register* (82 FR 33009-01) on July 19, 2017, established the current \$81 user fee per part of the EA SEE. At that time the Treasury Department and the IRS determined that a \$81 user fee per part would recover the full direct and indirect costs the government would incur to oversee the EA SEE. The contractor who administers the EA SEE also charges individuals taking the EA SEE an additional fee for its services. For the May 2021 to February 2022 testing period, the contractor's fee is \$104 for each part of the EA SEE.

As required by OMB Circular A-25, in 2021 the IRS conducted a biennial review of the EA SEE user fee and calculated its costs for overseeing the examination. As a result of the review, the IRS determined that its full cost for overseeing the EA SEE is \$99 per part, plus an amount payable directly to a third-party contractor for its services.

The proposed regulations increase the amount of the user fee for taking the EA SEE from \$81 per part to \$99 per part. This amount is in addition to an amount payable directly to the third-party contractor for each part. The IRS does not intend to subsidize any of the cost of making the EA SEE available to examinees and is not applying for an exception to the full-cost requirement in OMB Circular A-25.

The increase in the user fee is primarily attributable to increases in salary and benefits for employees conducting activities related to the EA SEE program. The proposed user fee accounts for the time and personnel necessary to oversee the development and administration of the EA SEE and to ensure the contractor complies with the terms of its contract. The IRS's oversight costs include costs associated with: (1) review and approval of materials used by the contractor in developing the EA SEE; (2) review of surveys of existing enrolled agents, which help to determine the topics to be covered in the EA SEE; (3) composition of potential EA SEE questions in coordination with the contractor's external tax law experts; and (4) analysis of the answers and raw scores of a testing population to determine a passing score.

In addition, IRS personnel ensure the contractor's compliance with its contract by reviewing the work of the contractor using an annual Work Breakdown Structure—a project management tool—and reviewing and verifying that the contractor is in compliance with a Quality Assurance Plan measuring customer satisfaction and accuracy. The IRS incurs additional costs associated with enforcing compliance with the Treasury contractor personnel security and training policies, Federal Information Security Modernization Act (FISMA), Section 508 of the Rehabilitation Act of 1973 and other laws, regulations and policies in the scope of the EA SEE contract; monitoring the contractor's help desk; and the resolution of test-related issues such as cheating incidents, appeals regarding test scores, refund requests, and customer service complaints that are not resolved by the contractor.

#### *D. Calculation of User Fees Generally*

The IRS follows generally accepted accounting principles (GAAP) in calculating the full cost of overseeing the EA SEE. The Federal Accounting Standards Advisory Board (FASAB) is the body that establishes GAAP that apply for Federal reporting entities, such as the IRS. FASAB publishes the FASAB Handbook of Accounting Standards and Other Pronouncements, as Amended (Current Handbook), which is available at [https://files.fasab.gov/pdf/2020\\_fasab\\_handbook.pdf](https://files.fasab.gov/pdf/2020_fasab_handbook.pdf). The Current Handbook includes the *Statement of Federal Financial Accounting Standards (SFFAS) No. 4: Managerial Cost Accounting Standards and Concepts*. SFFAS No. 4 establishes internal costing standards under GAAP to accurately measure and manage the full cost of Federal programs, and the methodology below is in accordance with SFFAS No. 4.

##### *1. Cost Center Allocation*

The IRS determines the cost of its services and the activities involved in producing them through a cost accounting system that tracks costs to organizational units. The lowest organizational unit in the IRS's cost accounting system is called a cost center. Cost centers are usually separate offices that are distinguished by subject matter area of responsibility or geographic region. All costs of operating a cost center are recorded in the IRS's cost accounting system. The costs charged to a cost center are the direct costs for the cost center's activities in addition to allocated overhead. Some cost centers work on different services across the IRS and are not fully devoted to the services for which the IRS charges user fees.

##### *2. Cost Estimation of Direct Costs*

The IRS uses various cost measurement techniques to estimate the costs attributable to oversight of the EA SEE. These techniques include using various timekeeping systems to measure the time required to accomplish activities, or using information provided by subject matter experts on the time devoted to a service or



activity. To determine the labor and benefits costs incurred to provide the service of providing the EA SEE, the IRS estimated the number of full-time employees required to conduct activities related to the costs of overseeing the EA SEE. The number of full-time employees is based on both current employment numbers and future hiring estimates. Other direct costs associated with overseeing the EA SEE include travel, training, and supplies.

### *3. Overhead*

When the indirect cost of a service or activity is not specifically identified from the cost accounting system, an overhead rate is added to the identifiable direct cost to arrive at full cost. Overhead is an indirect cost of operating an organization that is not specifically identified with an activity. Overhead includes costs of resources that are jointly or commonly consumed by one or more organizational unit's activities but are not specifically identifiable to a single activity.

These costs can include:

- General management and administrative services of sustaining and supporting organizations.
- Facilities management and ground maintenance services (security, rent, utilities, and building maintenance).
- Procurement and contracting services.
- Financial management and accounting services.
- Information technology services.
- Services to acquire and operate property, plants, and equipment.
- Publication, reproduction, and graphics and video services.
- Research, analytical, and statistical services.
- Human resources/personnel services.
- Library and legal services.

To calculate the overhead allocable to a service, the IRS multiplies an overhead rate by the estimated direct costs. The IRS calculates the overhead rate annually based on the Statement of Net Cost included in the IRS annual financial statements. The financial statements are audited by the Government Accountability Office. The overhead rate is the ratio of the IRS's indirect costs divided by the direct costs of its organizational units. Indirect costs are labor, benefits, and non-labor costs (excluding IT related to taxpayer services, enforcement, and business system modernization) from the supporting and sustaining organizational units. Direct costs are the labor, benefits, and non-labor costs for the IRS's organizational units that interact directly with taxpayers.

For the EA SEE user fee review, the Fiscal Year (FY) 2021 overhead rate of 58.83 percent was used. The rate was calculated based on the FY 2020 Statement of Net Cost as follows:

Total Indirect Costs		\$4,274,512,375
Total Direct Costs	÷	\$7,265,460,800
Overhead Rate		58.83%

#### *E. Calculation of the EA SEE User Fee*

##### *1. Cost Estimate*

The IRS projected the estimated costs of direct labor and benefits based on the actual salary and benefits of employees who devote time to oversee the administration of the EA SEE program, reduced to reflect the percentage of time each individual spends overseeing the EA SEE program. RPO's managers estimated the percentage of time these employees devote to overseeing the EA SEE based on their knowledge of actual program assignments. Six employees devote seventy-five percent of their time to EA SEE-related activities. Two employees who are contracting officer representatives devote 90 percent and 80 percent of their time, respectively, to EA

SEE-related activities. Additional staffing costs include oversight and support associated with these functions.

The baseline for the labor and benefits estimate was the actual salary and benefits for FY 2021. From this baseline, the IRS estimated the direct labor and benefits costs over the next three years using an inflation factor for FYs 2022, 2023, and 2024. The IRS used a three-year projection because the increase in future labor and benefits costs are reliably predictable representations of the actual costs that will be incurred by the RPO. These estimated direct labor and benefits costs were then reduced to reflect the percentage of time each individual devoted to the EA SEE program and are set out in the following table:

<b>Year</b>	<b>Estimated direct labor and benefit costs</b>
2022	\$1,346,086.00
2023	\$1,376,656.00
2024	\$1,407,937.00
Total	\$4,130,679.00

The IRS estimated \$12,000 in additional direct costs for each year for travel, training, and supplies.

The total estimated direct costs for the three years is \$4,166,679. After estimating the total direct costs, the IRS applied the FY 2021 overhead rate of 58.83 percent to the estimated direct costs to calculate indirect costs of \$2,451,257, for a total cost for the three-year period of \$6,617,936.

The calculation of the total cost of the EA SEE program for 2022 through 2024 is below:

Direct Costs		\$4,166,679
Overhead at 58.83%	+	<u>\$2,451,257</u>

Total EA SEE Cost	\$6,617,936
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## 2. *Volume of Examinations*

The number of examination parts provided during FYs 2018, 2019, and 2020 were 23,286; 23,945; and 19,913, respectively. The total number of examination parts provided during the three years was 67,144. The IRS used this historical three-year volume to estimate the number of examination parts it expects to provide in FYs 2022, 2023, and 2024.

## 3. *Unit Cost Per Exam*

To arrive at the total cost per examination part, the IRS divided the estimated three-year total of EA SEE costs by the total volume of examination parts expected over the same three-year period to determine a unit cost per examination part of \$99, as shown below

Total EA SEE Cost		\$6,617,936
Volume	÷	<u>67,144</u>
Unit Cost per exam part		\$99

As noted in section C, the contractor who administers the EA SEE also charges individuals taking the EA SEE an additional fee for its services. For the May 2022 to February 2023 and May 2023 to February 2024 testing periods, the contractor's fee is \$104 and \$107, respectively, for each part of the EA SEE. The fee charged by the contractor is fixed by the current contract terms and therefore cannot be reduced or renegotiated at this time. The contract was subject to public procurement procedures, and there were no tenders that were more competitive. The contract will expire on February 28, 2024. The fee charged by the contractor may change when the contract expires. Any future contract will be subject to the public procurement procedures.

## **Special Analyses**

This regulation is not significant and is not subject to review under section 6(b) of Executive Order 12866 pursuant to the Memorandum of Agreement (April 11, 2018) between the Treasury Department and the Office of Management and Budget regarding review of tax regulations. Pursuant to the Regulatory Flexibility Act (5 U.S.C. chapter 6), it is hereby certified that these proposed regulations will not have a significant economic impact on a substantial number of small entities. The proposed regulations remove the ERPA SEE user fee as the IRS no longer offers the examination or new enrollment as an enrolled retirement plan agent. The EA SEE user fee primarily affects individuals who take the EA SEE. Only individuals, not businesses, can be enrolled agents. Thus, the economic impact of these regulations on any small entity would be a result of an individual enrolled agent owning a small entity or a small entity employing an enrolled agent and reimbursing the individual for the fee. The Treasury Department and the IRS estimate that an average of 22,381 EA SEE examination parts will be taken by individuals annually. Therefore, a substantial number of small entities is not likely to be affected. Further, the economic impact on any small entities affected would be limited to paying the \$18 difference in cost between the \$99 user fee and the previous \$81 user fee per part (for each enrolled agent that a small entity employs and pays for), which is unlikely to present a significant economic impact. The total economic impact of this regulation is thus approximately \$402,858 annually, which is the product of the approximately 22,381 examination parts and the \$18 increase in the fee per part. Accordingly, the rule is not expected to have a significant economic impact on a substantial number of small entities, and a regulatory flexibility analysis is not required.

Pursuant to section 7805(f) of the Internal Revenue Code, this notice of proposed rulemaking has been submitted to the Chief Counsel of the Office of Advocacy of the Small Business Administration for comment on its impact on small business.

## **Comments and Public Hearing**

Before these proposed amendments to the regulations are adopted as final regulations, consideration will be given to comments that are submitted timely to the IRS as prescribed in the preamble under the “ADDRESSES” section. The Treasury Department and the IRS request comments on all aspects of the proposed regulations. Any electronic comments submitted, and to the extent practicable any paper comments submitted, will be made available at [www.regulations.gov](http://www.regulations.gov) or upon request.

A public hearing is being held by teleconference on November 23, 2021 beginning at 10:00 a.m. EST unless no outlines are received by **[INSERT DATE 45 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**. The rules of 26 CFR 601.601(a)(3) apply to the hearing. Persons who wish to present oral comments by telephone at the hearing must submit written or electronic comments and an outline of the topics to be addressed and the time to be devoted to each topic by **[INSERT DATE 45 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]** as prescribed in the preamble under the “ADDRESSES” section.

A period of 10 minutes will be allocated to each person for making comments. After the deadline for receiving outlines has passed, the IRS will prepare an agenda containing the schedule of speakers. Copies of the agenda will be made available at [www.regulations.gov](http://www.regulations.gov), search IRS and REG-100718-21. Copies of the agenda will also be available by emailing a request to [publichearings@irs.gov](mailto:publichearings@irs.gov). Please put “REG-100718-21 Agenda Request” in the subject line of the email.

### **Drafting Information**

The principal author of these regulations is Karen Wozniak, Office of the Associate Chief Counsel (Procedure and Administration). Other personnel from the Treasury Department and the IRS participated in the development of the regulations.

### **List of Subjects in 26 CFR Part 300**

Reporting and recordkeeping requirements, User fees.

## Proposed Amendments to the Regulations

Accordingly, 26 CFR part 300 is proposed to be amended as follows:

### PART 300 – USER FEES

Paragraph 1. The authority citation for part 300 continues to read as follows:

Authority: 31 U.S.C. 9701.

#### **§300.0 [Amended]**

Par. 2. Section 300.0 is amended by removing paragraph (b)(9) and redesignating paragraphs (b)(10) through (12) as paragraphs (b)(9) through (11).

Par. 3. Section 300.4 is amended by revising paragraphs (b) and (d) to read as follows:

#### **§300.4 Enrolled agent special enrollment examination fee.**

\* \* \* \* \*

(b) *Fee.* The fee for taking the enrolled agent special enrollment examination is \$99 per part, which is the cost to the government for overseeing the development and administration of the examination and is in addition to the fees charged by the administrator of the examination.

\* \* \* \* \*

(d) *Applicability date.* This section applies to registrations for the enrolled agent special enrollment examination that occur on or after **[DATE 30 DAYS AFTER PUBLICATION OF THE FINAL RULE IN THE FEDERAL REGISTER]**.

#### **§300.9 [Removed]**

Par. 4. Section 300.9 is removed.

**§§300.10 through 300.12 [Redesignated as §§300.09 through 300.11]**

Par. 5. Redesignate §§300.10 through 300.12 as §§300.09 through 300.11.

Douglas W. O'Donnell,

Deputy Commissioner for Services and Enforcement.

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